No. 80-1693

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ALEXA

In the Supreme Court of the United States

OCTOBER TERM, 1980

CHURCH OF SCIENTOLOGY OF CALIFORNIA, PETITIONER

v.

SHIRLEY FOLEY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's claims are barred by the District of Columbia statute of limitations.

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OPINIONS BELOW

The opinion of the court of appeals on rehearing en banc (Pet. App. 31a-53a) is not yet reported. The panel opinion of the court of appeals (Pet. App. 9a-30a) is reported at 640 F.2d 1335. The order of the district court (Pet. App. 8a) is unreported.

JURISDICTION

The judgment of the court of appeals on rehearing en banc was entered on January 8, 1981. The petition for a writ of certiorari was filed on April 8, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In March 1977, petitioner commenced this action for damages against four federal employees

in their individual capacities (C.A. App. 2).[1] Invoking federal-question and diversity jurisdiction, petitioner asserted claims under the First and Fifth Amendments and the common law of the District of Columbia (*ibid.*). In particular, the complaint alleged that respondents, acting "under color of their federal authority" (*ibid.*), had participated in writing and disseminating the so-called "Foley memorandum" that contained statements concerning petitioner that respondents "knew, or with the exercise of reasonable care and due diligence should have known, [were] false" (C.A. App. 4). The complaint also alleged that respondents "caused the * * * [m]emorandum to be included and maintained in * * * official [governmental] files," which they "knew, or should have known, * * * would cause the false information contained therein to be disseminated to various * * * governmental agencies, as well as * * * [to] the private sector to the detriment of [petitioner]" (C.A. App. 5).[2]

Respondents moved to dismiss the complaint on the ground that it essentially sounded in defamation and therefore was barred under the District of Col-

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[1] "C.A. App." refers to the appendix filed in the court of appeals.

[2] The memorandum was prepared in November 1967. Although petitioner alleged that it had been "painfully aware" of governmental mistreatment since that time (C.A. App. 7), it further alleged that it "failed to discover * * * the identity of any individuals who caused such discrimination and harassment, or the means by which they did so, until April 17, 1975, * * * [at which time the memorandum] was disclosed by the Los Angeles, California branch of the [Immigration and Naturalization Service] to [petitioner] for the first time pursuant to [petitioner's] request under the Freedom of Information Act" (*ibid.*).

umbia's one-year statute of limitations (D.C. Code Ann. § 12-301(4) (1973)). Thereafter, the district court allowed petitioner to amend its complaint. The amended complaint was substantially identical to the original complaint (Pet. App. 38a-39a); the principal difference was that the amended pleading sought to clarify that petitioner "intended to allege that negligence of the [respondents] resulted in the damages complained of" (C.A. App. 28), and accordingly it included scattered references to allegedly "negligent" acts by respondents (Pet. App. 1a, 5a-6a).

Following the filing of the amended complaint, respondents renewed their motion to dismiss. In October 1977, the district court granted respondents' motion and dismissed the complaint (Pet. App. 8a). The court concluded that "despite [petitioner's] emphasis upon negligence the allegations in [petitioner's] amended complaint sound most nearly in defamation" (*ibid.*). Therefore, "apply[ing] the most analogous statute of limitations of [the District of Columbia]," the court held that petitioner's action was time-barred by the "District of Columbia statute of limitations of one year for libel and slander" (*ibid.*).

On appeal, a panel of the court of appeals reversed in part and remanded (Pet. App. 9a-30a). The court agreed that the action was governed by the most analogous District of Columbia statute of limitations (*id.* at 13a n.7, 25a), and it sustained the dismissal of the complaint "to the extent the complaint is one for defamation" (*id.* at 13a). However, referring to petitioner's contention that respondents' "actions constitute a breach of their duty to ensure that government files compiled and maintained under their personal supervision are truthful and accurate" (*id.* at 17a), the majority remanded the cause to the

district court "to permit [petitioner] to make its case that Congress, in passing the statute that authorized the activity of [respondents], intended to require due care in its execution" (Pet. App. 20a), and hence that the suit fell within the District of Columbia's three-year statute of limitations for negligence (D.C. Code Ann. § 12-301(8) (1973)).[3] The dissenting judge would have "affirm[ed] the order of the district court" (*id.* at 30a) on the ground that all of the claims asserted by petitioners served the same "*purpose*" as a defamation action (*id.* at 25a) in light of the " 'nature of the injury involved' " (*ibid.*) and "the interest sought to be protected" (*id.* at 27a), and thus were barred "by the one-year limitation for libel and slander" (*id.* at 29a).

On respondents' petition for rehearing en banc, the full court of appeals set aside the panel's decision and held that the amended "complaint filed in this case was properly dismissed by the [d]istrict [c]ourt, basically for the reason stated in its order * * * " (Pet. App. 32a). A concurring opinion emphasized that the one-year limitations period was applicable because "the purpose of each of [petitioner's potential] claims is to recover damages for defamation" (*id.* at 33a) and that "*en banc* rehearing was necessary to maintain the uniformity of [the circuit's] decisions" (*ibid.*). Three judges dissented from en banc consideration on the grounds "that nothing in this case presents a question of exceptional importance and that the majority panel opinion portends no conflict with our past holdings" (*id.* at 35a).

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[3] The panel majority "expressly decline[d] to find that [petitioner] has a right of action arising under the Constitution" (Pet. App. 18a-19a; see also *id.* at 27a n.11).

ARGUMENT

Further review of this case is unwarranted. The sole question presented is whether petitioner's action is time-barred. All of the judges below agreed that the District of Columbia statute of limitations governs the issue (Pet. App. 8a, 13a n.7, 25a, 32a, 33a-34a, 46a-47a n.51),[4] and petitioner has not contended otherwise. Thus, the only controversy is whether the lower courts "picked the right provision" of District of Columbia law to apply here (*id.* at 47a n.51). The decision of the en banc court of appeals is correct and does not call for this Court's review.

Contrary to petitioner's assertions, the court below did not pass upon the question whether the amended complaint stated a claim for relief under the Constitution, federal statutes, or the common law. Rather than resolving that substantive issue, the court held that such claims, *assuming* that they exist, most closely resemble a defamation action and hence are foreclosed in this case by the applicable statute of limitations. As the district court explained (Pet. App. 8a) in an order that was adopted by the en banc court of appeals (*id.* at 32a), "the allegations in [petitioner's] amended complaint sound most nearly in defamation * * * [notwithstanding petitioner's] emphasis upon negligence * * *." And, as expressly stated in the concurring opinion on rehearing en banc (*id.* at 33a), "three potential claims have been suggested * * * [arising] under the First and Fifth Amendments, * * * [a] federal statute or regulation * * *, [and] common law negligence * * *. Yet, the *purpose* of each of these claims is to recover damages for defamation. Therefore, the

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[4] See also *United Parcel Service* v. *Mitchell*, No. 80-169 (Apr. 20, 1981), slip op. 3-4; *Board of Regents of New York* v. *Tomanio*, 446 U.S. 478, 483-484 (1980).

statute of limitations applicable to actions for defamation determines whether the suit was timely filed."

Nothing in the dissenting opinion on rehearing en banc suggests a different conclusion, as petitioner urges (Pet. 7). The dissent argued that en banc consideration was inappropriate in the present case. In advancing that view, the dissent observed (Pet. App. 47a-48a), in the passage cited by petitioner (Pet. 7), that "[t]hree potential claims have been suggested * * *. * * * If any one of these claims is valid, the three-year limitation period may be legally viable. The issue, then, is whether [petitioner] could have supported a claim for relief under one or more of these theories." However, rather than addressing either the legal validity of such claims or the appropriate statute of limitations to be applied to them, the dissent noted only that there was "no reason whatsoever for summoning [the court of appeals'] *en banc* authority" to consider those issues (Pet. App. 48a). Accordingly, petitioner's reliance on the dissenting opinion is entirely misplaced.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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